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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

ROBERT H. ALAND,

Plaintiff,

v.

**U. S. DEPARTMENT OF THE INTERIOR;
SALLY JEWELL**, Secretary of the U. S. Department
of the Interior; **CHRISTOPHER SERVHEEN**, Grizzly
Bear Recovery Coordinator, U. S. Fish & Wildlife Service,
U. S. Department of the Interior,

Defendants.

1:13-cv-03547
Judge Robert W. Gettleman
Magistrate Judge Arlander Keys

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MAY 13 2013

**COMPLAINT UNDER FREEDOM OF INFORMATION ACT
FOR**

INJUNCTIVE RELIEF AND ORDER FOR PRODUCTION OF AGENCY RECORDS

I. INTRODUCTION

1. This is a civil action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to enjoin Defendants from withholding records of the U. S. Department of the Interior ("DOI") and order production of records improperly withheld from Plaintiff.

II. PARTIES

2. Plaintiff is an individual residing in Winnetka, Cook County, Illinois, United States of America.

3. Defendant DOI is the federal agency that has responsibility for the administration, management and protection of America's natural and cultural resources. One of Defendant DOI's agencies is the U. S. Fish & Wildlife Service ("FWS") the mission of which is to

conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people.

4. Defendant Jewell was sworn in as the 51st Secretary of the DOI on April 12, 2013, and serves in that capacity on the date of filing this action. Defendant Jewell succeeded Ken Salazar as Secretary of the Interior and is a party to this action in her official capacity.

5. Defendant Servheen is FWS's Grizzly Bear Recovery Coordinator ("GBRC) and is a party to this action in his official capacity.

III. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 (federal question).

7. This Court can enjoin Defendants from withholding records of the DOI and order production of records improperly withheld from Plaintiff pursuant to 5 U.S.C. § 552(a)(4)(B).

8. Venue for this action is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff resides in the Northern District of Illinois, Eastern Division.

9. Plaintiff has exhausted his administrative remedies to obtain the records improperly withheld by Defendants pursuant to 5 U.S.C. § 552(a)(6)(A) and (C).

IV. FOIA

10. The FOIA requires a federal agency such as Defendant DOI to make agency records available to any person for inspection and copying, promptly after receiving a request from such person that reasonably describes the records, in accordance with rules and procedures and fee schedules published by the agency. 5 U.S.C. § 552(a).

11. “Disclosure, not secrecy, is the dominant objective” of the FOIA. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Patterson v. Internal Revenue Service*, 56 F.3d 832, 835 (7th Cir. 1995). The FOIA is designed to “pierce the veil of administrative secrecy and to open agency action to the light of scrutiny.” *Rose* at 361.

12. Defendant DOI’s regulation obligates Defendants to make DOI records available to the public “consistent with the spirit of the FOIA.” 43 C.F.R. § 2.2.

13. The FOIA provides limited exemptions from the agency’s obligation to make its records available to the requesting person; reasonably segregable portions of records must be provided after deletion of the exempt portions. 5 U.S.C. § 552(b). The agency is prohibited from withholding records except as specifically stated in the FOIA. 5 U.S.C. § 552(d).

14. Exemptions under the FOIA are construed narrowly in favor of disclosure. *Rose* at 361 (“[T]hese exemptions do not obscure the fact that disclosure, not secrecy, is the dominant objective” of the FOIA.); *Patterson*, 56 F.3d at 835; *Kozacky & Weitzel, P.C. v. Internal Revenue Service*, 2008 U.S. Dist. LEXIS 29779 at 4 (N. D. Ill. 2008).

15. The FOIA requires the agency to determine within 20 working days after receipt of an appeal whether the denial is upheld in whole or in part, informing the requester, in the event of a denial, of the requester’s right to judicial review of the determination. 5 U.S.C. § 552(a)(6)(A)(ii). The 20-day period can be extended by the agency in “unusual circumstances” for a limited period. 5 U.S.C. § 552(a)(6)(B)(i).

16. The requester will be deemed to have exhausted his administrative remedies in litigation against the agency to require production of withheld records if the agency violates the statutory deadlines described in Paragraph 15 unless the agency can show “exceptional circumstances” (excluding delay resulting from a predictable workload of requests) and “due

diligence” in responding to the request; and in that situation the court can retain jurisdiction and allow the agency additional time to review its records. 5 U.S.C. § 552(a)(6)(C).

17. Because the FOIA is construed in favor of disclosure and the agency alone possesses, reviews, discloses and withholds the records that are the subject of a request under the FOIA, the agency bears the burden of establishing that the search for requested records was adequate and that exemptions asserted to withhold records are applicable. 5 U.S.C. § 552(a)(4)(B); *Patterson*, 56 F.3d at 836; *Becker v. Internal Revenue Service*, 34 F.3d 398, 402 (7th Cir. 1994); *Erwin v. Department of State*, 2013 U.S. LEXIS 30170 at 7-8 (N. D. Ill. March 6, 2013); *Kozacky & Weitzel, P.C.*, 2008 U.S. Dist. LEXIS 29779 at 4. If the agency’s affidavits do not provide sufficient information for the court to evaluate exemption claims, the agency can be required to file an index in which it lists the title of the record or category of records, the date of the record, the author and recipient(s), a detailed factual description of the record and the statutory exemption relied upon by the agency to support withholding of the record. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973); *Kozacky & Weitzel*, 2008 U.S. Dist. LEXIS 29779 at 3-7.

18. The court can review withheld or redacted records *in camera* to determine whether such records were properly withheld or redacted. 5 U.S.C. § 552(a)(4)(B); *Stanley v. Department of the Treasury*, 2007 U.S. Dist. LEXIS 23185 (N.D. Ind. 2007).

19. The agency must conduct an adequate search for records requested under the FOIA; adequacy is judged by the standard of reasonableness as to scope and methodology. *Patterson*, 56 F.3d at 840; *Becker*, 34 F.3d at 406; *Erwin*, 2013 U.S. LEXIS 30170 at 9. The adequacy of the search necessarily depends upon the circumstances of the particular case. *Davis v. Department of Justice*, 460 F.3d 92, 103 (D.C. Cir. 2006). In appropriate cases discovery is allowed to determine whether the agency conducted an adequate search. *Kozacky & Weitzel*,

P.C. v. Internal Revenue Service, 2008 U.S. Dist. LEXIS 29779 at 15-20 (N. D. Ill. 2008) (“One might reasonably infer . . . that continuous prodding was required to get the [agency] to conduct a search for responsive documents. One might also reasonably question whether the search that was done after the filing of this case was reasonable or half-hearted and done only so the [agency] could appear responsive.”).

20. The court can assess against the agency reasonable attorney fees and other litigation costs reasonably incurred by the requester if the requester substantially prevails. 5 U.S.C. § 552(a)(4)(E).

21. “The [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies . . . should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. . . .” *Presidential Memorandum for the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009).

22. To carry out the presumption stated in Paragraph 21, “an agency should not withhold information simply because it may do so legally”; “whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure”; and “the Department of Justice will defend a denial of a FOIA request only if (1) the

agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Attorney General Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (March 21, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

V. FACTUAL BACKGROUND

A. August 9 Request

23. By letter dated August 9, 2012 (“August 9 Request”), addressed jointly to Ken Salazar, then Secretary of the DOI, and Defendant Servheen, then GBRC, Plaintiff requested records pursuant to the FOIA relating to the (a) May 24, 2012, letter from Wyoming Governor Matthew H. Mead to Secretary Salazar requesting a new and expedited effort to remove protection under the federal Endangered Species Act for grizzly bears in the Greater Yellowstone Area (“May 24 Letter”); (b) July 19, 2012, letter from Secretary Salazar to Governor Mead responding to the May 24 Letter (“July 19 Letter”); and (c) 2011 decision of the U. S. Court of Appeals for the Ninth Circuit in *Greater Yellowstone Coalition v. Salazar*, 665 F.3d 1015 (9th Cir. 2011) (“GYC Case”), that invalidated Defendants’ removal of the bears’ protection in 2007.

24. The August 9 Request clearly and precisely identified the requested records in separately numbered paragraphs. Those paragraphs did not require interpretation, clarification or explanation to determine which records were requested.

25. By letter dated August 30, 2012 (reference 7202-4-OS-2012-00466), Clarice Julka, FOIA Officer, Office of the Secretary, DOI, Washington, DC, acknowledged receipt of the August 9 Request on August 30, 2012¹; stated that the August 9 Request was assigned control number OIS-2012-00466 and classified as an “other-use request” for fee purposes; stated that it

¹ The U.S. Postal Service Priority Mail online tracking service stated that the August 9 Request was delivered to Defendant DOI on August 15, 2012.

was necessary to consult with Defendant DOI's Office of the Executive Secretariat and Office of the Assistant Secretary for Fish, Wildlife & Parks; stated that a 10-workday response extension was taken under 43 C.F.R. § 2.13(3); and stated that the August 9 Request was placed in the "Complex" processing track under 43 C.F.R. § 2.26.

B. September 20 Response

26. By letter dated September 20, 2012 ("September 20 Response"),² FOIA Officer Julka provided a compact disc ("CD #1") containing only 4 files and a total of only 31 pages in response to the August 9 Request.

27. The following records provided on CD #1 were responsive to the August 9 Request: (a) "Data Tracking System (DTS)" that referred as a single line item to obtaining Secretary Salazar's signature on the July 19 Letter as an action item (1 page) and (b) series of e-mails stating "Yellowstone grizzly options for path forward" or "Centennial Mountain sheep grazing" on the "Subject" line with extensive redactions claimed on the basis of the "deliberative process privilege" pursuant to 5 USC § 552(b)(5) ("DOI Redacted Records"; 14 pages).

28. The other records provided on CD #1 (16 pages) related to "Grizzly Bear DNA Study" and "Centennial Mountain sheep grazing" and were not responsive to the August 9 Request.

29. There were responsive records in the possession of Secretary Salazar and other DOI offices in addition to the records described in Paragraph 27 ("DOI Additional Records") that related to the May 24 Letter, July 19 Letter and GYC Case (which was discussed in the May 24 Letter and the July 19 Letter). For example, there (a) presumably were records relating to the pre-arranged exchange of the May 24 Letter and the July 19 Letter and (b) necessarily were records relating to the (i) May 24

² The September 20 Response was received by Plaintiff on October 1, 2012.

Letter that suggested an appropriate response by Secretary Salazar and/or otherwise provided comments and (i) substance and timing of the July 19 Letter, since the July 19 Letter was not prepared, signed and issued in final form by Secretary Salazar without input from other persons within his office or other offices of the DOI, including the FWS and Defendant Servheen. (One disclosed record is an e-mail with which Defendant Servheen transmitted a draft of the July 19 Letter for consideration by Secretary Salazar and his assistants.) Similarly, there necessarily were analyses of and/or comments on the GYC Case, which invalidated the FWS's action in removing Endangered Species Act protection for grizzly bears in the Greater Yellowstone Area.

30. The DOI Additional Records were not provided to Plaintiff with, or referred to in, the September 20 Response due to an inadequate search or improper withholding or both.

31. The September 20 Response did not correlate the records provided on CD #1 to the separately numbered paragraphs in the August 9 Request.

32. By fax dated October 1, 2012, to FOIA Officer Julka (and another FOIA Officer previously identified by FOIA Officer Julka), with copy to Defendant Servheen, Plaintiff stated that the September 20 Response was not responsive to the August 9 Request; that Defendant Servheen had failed to provide a response of any type to the August 9 Request; and that compliance with the August 9 Request would have to be litigated unless complete responses were provided by Defendants. Plaintiff did not receive a response to the October 1, 2012, fax.

C. October 3 Response

33. By letter dated October 3, 2012 ("October 3 Response"), file reference BA/FOIA MS 60180, Stephen A. Smith, Region 6 FOIA Officer, Mountain-Prairie Region, FWS, DOI, Lakewood, Colorado, prodded by Plaintiff's October 1, 2012, fax, responded to the August 9 Request on behalf of Defendant Servheen. The October 3 Response was transmitted to Plaintiff

as a digitally-signed attachment to an October 3, 2012, e-mail from Antionette Urioste of the same office, which contained a link to a FWS website containing various file folders, including one file folder entitled “Grizzly Bear – (Aland),” that contained a list of, and link to, records provided to Plaintiff (“October 3 Website Records”).³

34. The link described in Paragraph 33, without notice to Plaintiff, was removed from the FWS website at some point in time between October 3, 2012, and the date this action was filed; and as a result Plaintiff ceased to have access to the October 3 Website Records.

35. The October 3 Response stated that “certain information” was redacted in 1 record (“FWS Redacted Record”) and one record was withheld in its entirety (“FWS Withheld Record #1”) pursuant to the attorney-client privilege provided by 5 USC § 552(b)(5).

36. There were responsive records in the possession of Defendant Servheen and other FWS offices in addition to the records described in Paragraph 35 (“FWS Additional Records”). For example, there (a) presumably were records relating to the pre-arranged exchange of the May 24 Letter and the July 19 Letter and (b) necessarily were records relating to the (i) May 24 Letter that suggested an appropriate response by Secretary Salazar and/or otherwise provided comments and (i) substance and timing of the July 19 Letter, since the July 19 Letter was not prepared, signed and issued in final form by Secretary Salazar without input from other persons within his office or other offices of the DOI, including the FWS and Defendant Servheen. (One disclosed record is an e-mail with which Defendant Servheen transmitted a draft of the July 19 Letter for consideration by Secretary Salazar and his assistants.) Similarly, there necessarily were analyses of and/or comments on the GYC Case, which invalidated the FWS’s action in removing Endangered Species Act protection for grizzly bears in the Greater Yellowstone Area. The FWS Additional Records were not

³ The other file folders on the FWS website related to requesters not related or known to Plaintiff.

provided to Plaintiff with, or referred to in, the October 3 Response due to an inadequate search or improper withholding or both.

37. By e-mail dated October 4, 2012, Plaintiff informed Ms. Urioste that (a) the October 3 Response provided only 1 responsive record (i.e., undated draft of the July 19 Letter); (b) other records that were provided were not responsive; (c) insufficient explanation was provided with regard to the FWS Redacted Record and the FWS Withheld Record #1; (d) the records provided were not correlated to the separately numbered paragraphs in the August 9 Request; and (e) the FWS Additional Records were not provided.

D. October 12 Response

38. By letter dated October 12, 2012 (“October 12 Response”), FOIA Officer Smith, prodded by Plaintiff’s October 4, 2012, e-mail, informed Plaintiff that (a) an “additional search” was performed and (b) 9 additional responsive records were provided on a compact disc (“CD #2”).⁴

39. The October 12 Response stated that 3 responsive records – FWS Redacted Record (see Paragraph 35), FWS Withheld Record #1 (see Paragraph 35) *and* 1 new responsive record (“FWS Withheld Record #2”) – were withheld under the attorney-client privilege provided by 5 U.S.C § 552(b)(5) from the October 3 and 12 Responses. A Privilege Document Index (“PDI”) inadequately describing these 3 withheld records was enclosed with the October 12 Response.

40. The statements in the October 3 and 12 Responses that there was only 1 FWS Redacted Record and the description of that record in the PDI (“07.16.2012_DTS Assignment”) were erroneous, since, in fact, 2 extensively redacted responsive records comprised the FWS Redacted Record (i.e., July 16, 2012, e-mail from Morgan to Thabault and Fahey; July 13, 2012,

⁴ It is not possible to determine how FOIA Officer Smith determined that 9 records were provided or to confirm the accuracy of that number.

e-mail from “DTS” to Morgan, Wellman, Nelson and Sayers); the subject of both redacted records was “DTS Assignment – Requests the Secretary work with the State of Wyoming to expedite the review to delist the grizzly bear under ESA.”

41. The FWS Additional Records were not provided to Plaintiff with, or referred to in, the October 12 Response due to an inadequate search or improper withholding or both.

E. Summary of Withheld and Redacted Records

42. Defendants have provided records to Plaintiff in confusing formats and have described withheld and redacted records in confusing and inadequate terms. Plaintiff believes that the following is a relatively accurate summary of the records at issue:

Defendants’ Response	Records at Issue	Reason for Redaction or Withholding	Para. Ref.
September 20	• DOI Redacted Records	Deliberative process privilege; 5 U.S.C. § 552(b)(5)	27
	• DOI Additional Records	Inadequate search and/or improper withholding	29, 30
October 3	• FWS Website Records	Removal from FWS website	33, 34
	• FWS Redacted Record	Attorney-client privilege; 5 U.S.C. § 552(b)(5)	35
	• FWS Withheld Record #1	Attorney-client privilege; 5 U.S.C. § 552(b)(5)	35
	• FWS Additional Records	Inadequate search and/or improper withholding	36
October 12	• FWS Redacted Record	Attorney-client privilege; 5 U.S.C. § 552(b)(5)	39, 40
	• FWS Withheld Record #1	Attorney-client privilege; 5 U.S.C. § 552(b)(5)	39
	• FWS Withheld Record #2	Attorney-client privilege; 5 U.S.C. § 552(b)(5)	39
	• FWS Additional Records	Inadequate search and/or improper withholding	41

VI. ADMINISTRATIVE APPEAL

43. Plaintiff (a) filed a timely appeal with Defendant DOI on October 30, 2012 (“October 30 Appeal”), of Defendants’ failure to provide responsive records and improper redaction of

responsive records in response to the August 9 Request in violation of the FOIA and (b) provided the reasons and documents in support of the October 30 Appeal. Copies of the October 30 Appeal were sent simultaneously to FOIA Officer Julka and Ms. Urioste.

44. Plaintiff has not received a response to the October 30 Appeal as of the date of the filing of this action in violation of 5 U.S.C. § 552(a) (6)(A) and (B) and 43 C.F.R. § 2.32. Thus, this action is timely filed pursuant to 5 U.S.C. § 552(a)(4)(B) and (6)(C) and 43 C.F.R. § 2.32.

VII. CLAIMS FOR RELIEF

A. Claim 1 – September 20 Response – Failure To Provide DOI Additional Records

45. Plaintiff incorporates by reference and restates the allegations in Paragraphs 1 through 44.

46. The DOI Additional Records were in the possession of Secretary Salazar and Defendant Jewell and other DOI offices; related to the May 24 Letter, the July 19 Letter and the GYC Case; and were not provided to Plaintiff in response to the August 9 Request in violation of 5 U.S.C. § 552(a).

47. The search for the DOI Additional Records by Secretary Salazar's and Defendant Jewell's offices and other DOI offices involved in responding to the August 9 Request was inadequate, possibly intentionally or negligently, in violation of 5 U.S.C. § 552(a).

B. Claim 2 – September 20 Response – Erroneous Claims of Deliberative Process Privilege

48. Plaintiff incorporates by reference and restates the allegations in Paragraphs 1 through 47.

49. The September 20 Response, in violation of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), does not explain why the claimed deliberative process privilege applies to the DOI Redacted Records. Instead the September 20 Response includes only a general tutorial with regard to the privilege that has no relevance with regard to the DOI Redacted Records.

50. The court stated in *Mead Data Central, Inc. v. United States*, 566 F.2d 242, 251 (D. C. Cir. 1977): "We require that when an agency seeks to withhold information it must provide a

relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.” (Citations omitted.) Moreover, the court stated that “an agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.” *Id.* at 258. The September 20 Response does not satisfy the requirements of proof set forth in *Mead Data Central* with regard to the DOI Redacted Records.

51. The deliberative process privilege does not apply to the DOI Redacted Records as a matter of fact, since (a) the DOI Redacted Records related to the May 24 Letter and July 19 Letter that were created for public consumption and received wide public circulation and (b) there is no indication in the DOI Redacted Records that confidentiality under the deliberative process privilege was ever intended for those records.

52. The deliberative process privilege does not apply to the DOI Redacted Records as a matter of law. Under that privilege, the government can only withhold records that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. E.g., *In re: Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). The two essential requirements are that the records must be pre-decisional and deliberative. The privilege is qualified and can be overcome by showing a need that outweighs any alleged harm resulting from disclosure. The two requirements are not met with regard to the DOI Redacted Records; and no harm can result from disclosure of those records.

53. The DOI Redacted Records were erroneously redacted in violation of 5 U.S.C. § 552(a).

C. Claim 3 – October 3 and 12 Responses – Failure To Provide FWS Additional Records

54. Plaintiff incorporates by reference and restates the allegations in Paragraphs 1 through 53.

55. The October 3 and 12 Responses characterized the August 9 Request as "Various Records concerning Grizzly Bears in the Greater Yellowstone area," an amorphous characterization that was incomplete and misleading. The August 9 Request clearly and precisely identified the records to be provided in 8 separately numbered paragraphs; and those paragraphs did not require interpretation, clarification or explanation. The characterization in the October 3 and 12 Responses was used to allow Defendant Servheen erroneously to claim that he reasonably responded to the August 9 Request despite providing records that were not responsive and withholding the FWS Additional Records.

56. The fact that an additional search was performed and additional records were provided with the October 12 Response, which would not have been performed or provided absent prodding by Plaintiff's October 4, 2012, e-mail (see Paragraph 37), established that the August 9 Request was not treated by Defendant Servheen in good faith and that there were FWS Additional Records when the October 3 Response was issued.

57. The FWS Additional Records were in the possession of Defendant Servheen and other FWS offices; related to the May 24 Letter, the July 19 Letter and the GYC Case; and were not provided to Plaintiff in response to the August 9 Request in violation of 5 U.S.C. § 552(a).

D. Claim 4 – October 3 and 12 Responses – Erroneous Claim of Attorney-Client Privilege

58. Plaintiff incorporates by reference and restates the allegations in Paragraphs 1 through 57.

59. The attorney-client privilege applies "only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of

committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

60. The *United Shoe* tests were not satisfied with regard to FWS Withheld Record #1 and FWS Withheld Record #2. For example (referring to the PDI), the July 16, 2012, redacted e-mail, contrary to the PDI, which identified Thabault as the author, was sent by Morgan to Thabault and Fahey with copy to Sayers; and Thabault, in turn, on July 16, 2012, forwarded that e-mail to Defendant Servheen, who was not the client. Morgan, together with Wellman, Nelson and Sayers, had received the redacted document on July 13, 2012, from “DTX@fws.gov.” The client was Secretary Salazar, the person to whom the May 24 Letter was addressed and from whom the July 19 Letter emanated. Thus, there was no attorney-client relationship involving Morgan, Thabault, Fahey, Wellman, Nelson, Sayers and Defendant Servheen to which the privilege could apply. In fact, no member of the group was identified as the attorney. Defendant Servheen confirmed the absence of an attorney-client relationship in his July 24, 2012, e-mail to Thabault by stating: “Thanks, Mike, for keeping me in the loop”; there would have been no need for a client to express appreciation to his attorney for being “kept in the loop.”

61. There was no intention by Defendant Servheen, Morgan, Thabault, Fahey, Wellman, Nelson, Sayers and/or any others to claim confidentiality under the attorney-client privilege, because FWS Withheld Record #1 and FWS Withheld Record #2 (a) did not contain privilege legends or otherwise indicate that the privilege was claimed and (b) related to the May 24 Letter and the July 19 Letter, which were created for public consumption and received wide public circulation.

62. Even if the attorney-client privilege otherwise applied to FWS Withheld Record #1 and FWS Withheld Record #2, the privilege was waived by disclosure of (a) redacted and withheld

records involving the same subject matter to internal recipients, who were not clients, and Plaintiff and (b) the May 24 Letter and July 19 Letter to the public.

63. Since the GYC Case has been finally resolved as a matter of law and is no longer pending and active in any court, any privilege that might have applied to records relating to the GYC case has ended.

64. FWS Withheld Record #1 and FWS Withheld Record #2 were erroneously withheld in violation of 5 U.S.C. § 552(a).

VIII. REQUESTED RELIEF

Plaintiff respectfully requests that this Court, after reviewing the DOI Redacted Records, FWS Redacted Record(s), FWS Withheld Record #1 and FWS Withheld Record #2 *in camera* pursuant to 5 U.S.C. § 552(a)(4)(B), to grant the following relief:

1. Enter an Order:

(a) Declaring that Defendants DOI, Jewell and Servheen have improperly withheld the DOI Additional Records, FWS Withheld Record #1, FWS Withheld Record #2 and FWS Additional Records;

(b) Declaring that Defendants DOI, Jewell and Servheen have improperly redacted the DOI Redacted Records and FWS Redacted Record(s);

(c) Declaring that Defendants DOI, Jewell and Servheen improperly removed the FWS website containing the FWS Website Records;

(d) Directing Defendants DOI, Jewell and Servheen to (i) perform additional, adequate and expeditious searches for the DOI Additional Records and the FWS Additional Records by a date certain and (ii) demonstrate to the Court that they have employed appropriate methods for adequate and expeditious searches;

(e) Enjoining Defendants DOI, Jewell and Servheen from withholding from Plaintiff the DOI Redacted Records, DOI Additional Records, FWS Withheld Record #1, FWS Withheld Record #2, FWS Redacted Record(s), FWS Additional Records and FWS Website Records; and

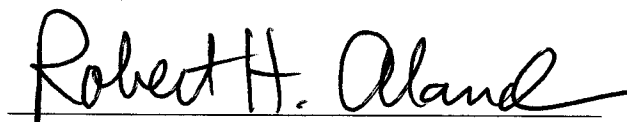
(f) Directing Defendants DOI, Jewell and Servheen to (i) produce to Plaintiff by a date certain the DOI Redacted Records without redaction, DOI Additional Records, FWS Withheld Record #1, FWS Withheld Record #2, FWS Redacted Record(s) without redaction and FWS Additional Records and (ii) restore the FWS website containing the FWS Website Records.

2. Retain jurisdiction over this action until Defendants Jewell and Servheen establish that they have complied with the FOIA and the Order of this Court.

3. Issue a written finding that the circumstances surrounding the withholding of records raises questions whether Defendants acted arbitrarily and capriciously with respect to the withholding within the meaning of 5 U.S.C. § 552(a)(4)(F).

4. Award Plaintiff reasonable costs and expenses associated with this action; and

5. Grant such additional relief to Plaintiff as the Court deems just and proper.

A handwritten signature in black ink that reads "Robert H. Aland". The signature is fluid and cursive, with a horizontal line underneath the name.

Robert H. Aland (Pro Se)
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(847) 784-0994

May 13, 2013